IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

1.INCOME TAX APPEAL No. 57 of 2003

M/S LAXMI ENGINEERING INDUSTRIES
V/S
I T O UDAIPUR

2. INCOME TAX APPEAL No. 58 of 2003

M/S LAXMI ENGINEERING INDUSTRIES
V/S
THE INCOME TAX OFFICER

3. INCOME TAX APPEAL No. 59 of 2003

M/S LAMI ENGINEERING INDUSTRIES
V/S
THE INCOME TAX OFFICER

Mr. SANJEEV JOHARI, for the appellant / petitioner

Mr. KK BISSA, for the respondent

Date of Order : 13.12.2007

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI MUNISHWAR NATH BHANDARI,J.

ORDER

These three appeals seek to challenge the order of the learned Income Tax Appellate Tribunal dt. 14.7.2003, deciding three appeals number 300 to 303 (JP) 2002.

All these appeals were admitted on 18.11.2003 by framing the following substantial questions of law:-

1. Whether the learned ITAT had material and were right in law in sustaining dis-allowance of Rs. 3,03,475/- being commission paid to M/s Laxmi Stone Pvt. Ltd.?

2. Whether the finding that the appellant could not give specific evidence regarding nature of services rendered by the said Company is without evidence and contrary to the evidence on records, are perverse and have vitiated the conclusion?

The precise controversy relates to the disallowance of the commission paid by the assessee to M/s. Laxmi Stone Pvt. Ltd., in the three relevant assessment years. The claim of the assessee had been, that when the Company was formed, an Indian machine was installed which was previously imported, and there was an understanding between the firm, and the share-holders, that in case the machine is successful, more plants will be sold, and the firm will give commission, and they will promote their sales. It is claimed, that the commission in question was paid in this regard.

The learned assessing officer had disallowed the commission, interalia finding, that the company is a sister concern of the assessee firm, and that no contract is shown to have been entered into between the assessee firm, and the company, that the assessee has simply resorted to device to reduce its income, and the payment is a bogus one. The other ground given is, that on opportunity being

given the assessee failed to produce any evidence regarding the details of the work done of the company, what was value of the goods, and service, given by the Company, what was the market value of the goods, and services, given by the company, and whether such goods and services, provided by the company, resulted in any profit to the assessee. Then provisions of Section 40A(2)(a) have also been considered, and the amount was disallowed as bogus payment.

The learned Commissioner cataloged the four circumstances in para-15, which were said to have been considered by the assessing officer, and were catalogued by the learned Commissioner, which read as under:-

> "(1) There is no written agreement for the payment of commission.
>
> (2) No details are available regarding the nature and extent of services provided by M/s. Laxmi Stone (P) Ltd. In order to earn the alleged commission.
>
> (3) The entry of the commission payment in the journal of M/s. Laxmi Stone (P) Ltd., which was found in the premises of the appellant firm at the time of survey, has been apparently made in a suspicious manner and not during the normal course of business.
>
> (4)M/s. Laxmi Sonte (P) Ltd. is a connected family concern. It has been filed loss returns for various assessment years including the assessment year under consideration. It is clear that the appellant firm has diverted part of its profit in the form of bogus commission to be adjusted against the losses declared by M/s. Laxmi Stone (P)Ltd."

After so cataloguing the circumstances, simply held, that these facts have not been disputed by the learned counsel for the assessee, and thus it was found, that the payment of commission was not genuine, rather there has been clear attempt by the assessee to somehow transfer part of the profit to the company.

Then, when the matter was carried to the Tribunal, the assessee produced voluminous evidence, comprising of number of affidavits of the persons who had purchased the plant from the present assessee, giving different bill numbers, dates, and the price, for which it were purchased, and also deposing that they were inspired to purchase the plant looking at the plant working, which had been commissioned at the work premises of the company, and finding it satisfactory, and that they purchased it on the performance of the plant, and being inspired by Shri Parvinder Singh. The learned Tribunal, in the impugned order, in para-20, recorded positive finding, to the effect, that admittedly partners of the firm were not directors of the company, the appellant firm constituted of Mr. K.G. Sharma and Kamlesh Devi, while the company has five directors. Admittedly Parvinder Singh is a Sikh, and is not a relation of the partners of the firm, and some of the directors were distant relatives. It was also noticed, that the appellant firm had submitted supporting affidavit on page 90 to 98, explaining that the supporting material

could not be produced before the assessing officer, as only three days' time was given to him, and considered the reasons given by the C.I.T. for discussing, and in para-25, only proceeded to hold that the appellant could not give specific evidence regarding nature of services rendered by the appellant before the lower authorities, and purporting to have regard to entire facts and circumstances of the case, proceeded to confirm the action of the assessing officer, and that of the C.I.T.

It is significant to note, that in this para-25 itself, it was further held by the learned Tribunal, that there was no need for any written agreement for the payment of commission, for the services rendered.

Assailing the impugned order, the learned counsel for the assessee submitted, that when it was admitted position, that the assessee and the company are not sister concern, and when it has been found that no written agreement was necessary for making payment of the commission, for the services rendered, then in view of the affidavits produced by the appellant before the learned Tribunal, it is more than clear, that the sales of the assessee were promoted by the activities of Shri Parvinder Singh, the director in the company, and in view of the agreement between the firm and the company, the commission was very much payable, and was accordingly paid. It was

also submitted, that significantly the amount paid by the assessee is duly credited in the books of accounts of the company. Not only that, the amount has been subjected to assessment of tax, in the hands of the company. In such circumstances, according to the learned counsel, the authorities below have proceeded, very substantially, if not solely, on suspicion, rather under the lurking suspicion, of the two being the sister concern, and on account of the books of accounts being found in the premises of the assessee, at the time of search, and on account of the entry in the books of account of the company looked suspicious, therefore, the impugned order is liable to be set aside.

On the other hand, learned counsel for the Revenue assailed the impugned order by contending, that apart from the fact that the books of the accounts were found at the premises of the assessee at the time of search, in the books of accounts of the company, entry clearly looked to be clandestinely made between two lines, and was not an act done in the regular course of business, and therefore, it is clear, that the profits of the assessee were simply attempted to be diverted to the company, and has rightly been disallowed by the learned authorities below. It was also contended, that the assessee has failed to produce any material to show, that any services were rendered by the company, which entitled the company to receive the

commission. May be, that the written agreement may not be necessary, but then, the evidence was required to be led by the assessee, and despite opportunities being given by the assessing officer, the assessee did not lead any evidence, and therefore, the Tribunal was right in upholding the disallowance of the amount.

We have considered the submissions. At the out set we may observe, that in J.K. Woolen Manufacturers Vs. C.I.T., reported in (1969) 72-ITR-612, Hon'ble the Supreme Court has clearly ruled, that the expenditure could not be disallowed merely on the basis of suspicion, rather in applying commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of assessee's business, reasonableness of the expenditure has to be judged from the point of view of the business and not of the department. In the present case as noticed above, admittedly the assessee and the company are not the sister concerns, as noticed by the learned Tribunal itself. Then, it has also been found by the learned Tribunal, that there is no requirement of any written agreement to be there, for the payment of commission. With these two circumstances, a million dollar circumstance which goes against the Revenue is, that the receipt of this amount had been shown by the company, in its books of accounts, and the company has already been assessed, regarding that amount, which fact is not in dispute.

Obviously, this clearly excludes the theory of payment being bogus payment, and negatives the suspicion entertained by the department, on account of, firstly the books of accounts of the company being found at the premises of the assessee, and secondly on account of the entry being their in the books of accounts inserted in clandestine manner between two lines.

Then, so far as the finding of the learned Tribunal, about the assessee having not led any specific evidence, regarding nature of services rendered by the company before authorities below is concerned, true it is that the assessee did not lead any evidence before the authorities below, as contemplated by the learned Tribunal, but then, at least he had led his own evidence, by deposing to the effect, that at the time when company was formed, an Indian machine was installed which were previously imported, and there was an understanding between the firm, and the share holders, that in case the machine is successful, more plants will be sold, and the firm will give commission, and they will promote their sales. This is very clear and categoric evidence of the assessee, about the nature of services rendered, terms of the agreement, and the eventualities in which the incident of commission would arise, attracting liability of the assessee towards the company, and to controvert this evidence, there is nothing on record, to show on the side of the Department,

as to how this agreement, or story of this agreement is wrong, or evidence is not reliable. This, coupled with the fact, as found above, that the assessing officer had given a very very short time to the assessee, with the result, that the assessee could not lead evidence before the authorities below, and therefore, the assessee had led voluminous evidence before the learned Tribunal, comprising of the affidavits available at page-90 to 98; apart from other affidavits, including that of Parvinder Singh himself.

A look at the order of the learned Tribunal does show, that the learned Tribunal has not at all even taken cognizance, much less has it appreciated the same, or has disbelieved them, by giving any reason good, bad, or indifferent, whatever. It is a different thing, that it is not shown before us, on the side of the Revenue, that even before the Tribunal, the evidence comprised in these affidavits, was in any manner controverted by the Revenue. That being the position, a bare reading of these affidavits does show, that all the deponents have consistently deposed, that all purchased machines, as detailed in each affidavit, for different prices, and vide different bill numbers, mentioned in the affidavits, and they had so purchased it, being inspired by performance of the machine installed in the business premises of the company, and on the advise, and with the cooperation of Parvinder Singh,

who is the key person in the company; apart from the fact, that this Parvinder Singh himself has also corroborated it, by filing his own affidavit.

Thus, the finding recorded by the learned Tribunal is vitiated on account of non reading of the material available on record as well.

Thus, in our view, it cannot be said that the learned Tribunal, or the authorities below were, correct in disallowing the amount of commission paid by the assessee during the relevant assessment years, and that the finding recorded by the learned Tribunal is contrary to the specific evidence led by the assessee, regarding the nature of service rendered by the company also.

After considering the totality of circumstances as discussed above, it is more than clear that as a matter of fact, the authorities below instead of proceeding with material on record, including tangible evidence, have proceeded solely, or in any case very substantially, on the basis of suspicion, on the face of above two facts, which was not permissible, more particularly on the face of above positive circumstances, available in favour of the assessee, discussed above.

Resultantly both the substantial questions of law,

as framed, are answered in favour of the assessee, and against the Revenue. The orders impugned are modified in the manner, that the dis-allowance of the amount of commission by the authorities below is set aside. The appeals are accordingly allowed.

(MUNISHWAR NATH BHANDARI),J. (N P GUPTA),J.

/Sushil/